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June 16, 2010

VIA ELECTRONIC FILING

EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, DC 20554

Re: **Notice of Ex Parte**

BitWise Communications, Inc. d/b/a OmiLEC Appeal of USAC Decision, CC
Docket Nos. 96-45 and WC Docket No. 06-122; In the Matter of a National
Broadband Plan for Our Future, WC Docket No. 09-51

Dear Ms. Dortch:

On June 15, 2010, BitWise Communications, Inc. ("BitWise") met with Vickie Robinson, Erica Myers and Carol Pomponio of the Wireline Competition Bureau in connection with the above-referenced proceedings. Attending this meeting on behalf of BitWise were John Furton and Tim Reynolds of Family Communications, Inc. ("Family Communications") and Charles Helein and Michael Donahue of Helein & Marashlian, LLC, outside counsel to Family Communications and BitWise.

During this meeting, we discussed Family's acquisition of BitWise, BitWise's broadband expansion plans and BitWise's petition. Copies of the materials presented and discussed at the meeting are enclosed.

If you have any questions concerning this matter, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/

Michael P. Donahue

Counsel for Family Communications, Inc. and
BitWise Communications, Inc.

Enclosure

cc: Vickie Robinson
Erica Myers
Carol Pomponio

Family Communications, Inc. and BitWise Communications, Inc.
Summary of Pending USAC Appeals in Docket Nos. 96-45 and 06-122

BitWise Communications, Inc. d/b/a OmniLEC (“BitWise”) provides competitive local exchange services to rural, small town central Illinois. In late 2009, BitWise was acquired by Family Communications, Inc. (“FCI”), a subsidiary of Midstates Video Corp. whose subsidiary, Family Video, is the largest privately held movie and game rental company in the United States.

With the additional resources available from FCI’s acquisition, BitWise has begun its roll-out of new facilities and service offerings. Specifically, BitWise will offer facilities-based, fiber-optic “triple-play” communications, Internet and video services to businesses, schools and residences throughout its existing footprint in Illinois. Its expansion of these services will provide competitive broadband offerings where few or none exist today, thereby fostering the Commission’s policies for promoting competition and bringing broadband services to rural communities. BitWise has already enjoyed its first success when the Pekin City, Illinois Council granted it a twenty-five-year franchise to bring its expanded services to that City’s businesses, schools, and residents.

In order to maximize the success of its expansion efforts, FCI is addressing unresolved business and regulatory issues that were created before its acquisition. One such regulatory issue concerns BitWise’s Form 499-A filings for 2008, 2007 and 2006. Due to inadvertent errors, BitWise reported the company’s total revenue in the interstate column of Line 423 (Line 423(d)) on its 2007 and 2006 Forms 499-A. On its 2008 Form 499-A, BitWise left line 423(d) completely blank, and USAC, unilaterally and without consulting with BitWise, used the “total” revenue reported in Line 423(a) as the revenue basis upon which contributions were assessed. These errors resulted in significantly overstated revenues subject to USF, TRS, NANP/LNP and annual FCC fees for the relevant years’ contributions. Upon discovery of these errors, BitWise filed revised Forms 499-A for each year. USAC rejected these revisions. Based on the facts and reasons detailed below, FCI submits that USAC’s rejections were contrary to existing USAC policy, FCC rules, and legal precedent and should be corrected.

A. The Revised 2008 Form 499-A

- BitWise timely filed its Revised 2008 Form 499-A.
 - FCC rules allow filers to make downward revisions to their original 499-A filings within one year of the original due date.
 - The due date of BitWise’s Original 2008 499-A was April 1, 2008. It mailed its Revised 2008 Form 499-A on March 27, 2009, four days prior to the one-year deadline for downward revisions. Had BitWise any concerns regarding the U.S. Postal Service’s ability to deliver mail from Illinois to Washington, D.C. in under four days, in retrospect, it would have sent the filings via overnight courier service. But it did not, nor would it be reasonable to impose a duty to use paid courier services.



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- BitWise appealed USAC's rejection and that appeal remains pending. Notably, USAC submitted no comments on BitWise's appeal and has not otherwise taken any actions to oppose or refute the fact that BitWise timely filed its Revised 2008 Form 499-A.
- Based on these unopposed facts, BitWise timely filed its Revised 499-A Form for 2008, leaving no basis for USAC's having rejected that revised filing.
- BitWise's rights are *sui generis* – they are based on the unique factual circumstances set forth above and do not implicate any rule or decision, nor do they require waivers or other action that could be construed as setting any precedent.
 - The fact is that BitWise timely filed its revised 499-A for 2008.
 - That fact is unchallenged and USAC simply made a factual error when it rejected BitWise's revised 499-A for 2008.
- USAC assumed the authority to complete BitWise's Form 499-A and, in so doing, used its judgment to determine BitWise's USF contribution base.
 - BitWise inadvertently left Line 423(d) blank on its Original 2008 Form 499-A.
 - Without any known attempts to verify the numbers BitWise provided in blocks 300 and 400 of the Form, USAC used "self help" to identify BitWise's contribution base and, in so doing, relied on the inaccurate figures mistakenly provided by BitWise.
 - Bitwise knows of no rule or decision by the Commission giving USAC the authority to "complete" missing items on a Form 499-A that is signed by a corporate officer of the reporting entity.
 - USAC should have notified BitWise of the missing information, which would have alerted BitWise to its larger mistake of over-reporting its revenues, thus avoiding the present situation entirely.
- *TOPUC* considerations support reversing USAC's rejection of the Revised 2008 Form 499-A.
 - The 5th Circuit Court of Appeals established that a USF contribution amount that exceeds a contributor's interstate revenues violates Section 254's requirement that all universal service contributions be "equitable and nondiscriminatory."
 - While the contribution amount assessed by USAC based on erroneous revenues reported on the Original 2008 499-A was not in excess of BitWise's 2007 interstate revenues, that contribution amount is but a few dollars short of its total 2007 interstate revenues. Therefore, the contribution amount assessed conflicts with the decision in *TOPUC*.
- Other Considerations - the APA and due process requirements dictate that USAC accept BitWise's Revised 2008 Form 499-A.
 - BitWise's due process guarantees require that the Commission ensures that USAC adheres to statutory and regulatory requirements, as well as its own policies and practices.



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- USAC's unsupported rejection of BitWise's timely filed revision cannot be allowed to go uncorrected lest, in doing so, the message is created that USAC may act in violation of *TOPUC*, section 254, the APA, Commission regulations and due process guarantees with impunity.

B. The Revised 2007 Form 499-A.

- USAC's rejection of the Revised 2007 499-A violates the Fifth Circuit's holding in *TOPUC*.
 - Because BitWise's USF contribution, as calculated based on the erroneous information contained in its Original 2007 Form 499-A, far exceeded its 2006 interstate revenues, allowing the rejection of the Revised Form 499-A filed by Bitwise would perpetuate a standing violation of section 254 of the Act as established by the Fifth Circuit in *TOPUC* and an arbitrary and capricious action in violation of the APA.
- USAC failed to notify BitWise of patently obvious errors in its Original 2007 Form 499-A.
 - USAC has a duty of care to ensure that filers are notified of patently obvious errors that result in overpayments.
 - The inequity of USAC's actions is illustrated by recent internal policy changes whereby USAC now notifies filers of discrepancies and apparent errors in filed forms.
- A waiver of the FCC's requirement that downward revisions be filed within one year is appropriate.
 - BitWise's excessive contribution amounts are the result of the company's inadvertent recording of TOTAL company revenues on line 423.
 - Upon realization of its error, BitWise took prompt action to correct past filings and ensure similar errors would be prevented in the future.
 - It performed an internal audit.
 - It retained counsel.
 - It subscribed to professional compliance services to assist with future filings.
 - It no longer employs the individual responsible for the reporting errors on its Original 2008, 2007 and 2006 Forms 499-A.

C. The Revised 2006 Form 499-A

- USAC failed to advise BitWise of patently obvious errors in its Original 2006 Form 499-A.
 - USAC has a duty of care to ensure that filers are notified of patently obvious errors that result in overpayments.
 - The inequity of USAC's actions is illustrated by recent internal policy changes whereby USAC now notifies filers of discrepancies or possible errors in filed forms.



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- A waiver of the FCC's requirement that downward revisions be filed within one year is appropriate.
 - BitWise's excessive contribution amounts are the result of the company's inadvertent recording of TOTAL company revenues on line 423.
 - These errors were obvious and should have been caught by USAC prior to manual data entry.
 - Upon realization of its errors, BitWise took actions to correct past filings and ensure similar errors would be prevented in the future.
 - It performed an internal audit.
 - It retained counsel.
 - It no longer employs the individual responsible for the reporting errors on its Original 2008, 2007 and 2006 Forms 499-As.
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D. Penalties and Interest

- BitWise should receive a refund or offset of the penalties and interest assessed pursuant to the DCIA.
 - BitWise adhered to USAC's pay-and-dispute policy and has paid all contributions invoiced by USAC, as well as penalties and interest in amounts that nearly doubled the principal debts.
 - Withholding a refund of penalties and interest based on illegitimate and erroneous contribution assessments is contrary to the public interest and would deprive the Company of funds which could be invested in network build-out and hiring.

E. TRS, LNP, NANPA, and FCC Regulatory Fees

- BitWise should receive a refund or offset of the penalties and interest related to BitWise's TRS, LNP, NANPA, and FCC regulatory fee payments.
 - USAC acts as the data collection agent for the LNP, NANPA, TRS programs, as well as the reporting agent for the FCC's regulatory fees.
 - BitWise should receive a refund or offset of the penalties and interest assessed pursuant to the DCIA.

